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IN THE

Supreme Court Of The United States

October Term, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.,

Petitioners,

v.

ROBERT P. CASEY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF AMICI CURIAE OF THE RUTHERFORD INSTITUTE AND THE RUTHERFORD INSTITUTES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, NEBRASKA, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, TEXAS, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WISCONSIN, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Table Of Authorities	iii
Interest Of Amici Curiae	1
Statement Of Facts	2
Summary Of Argument	3
Argument	5
I. A STATE STATUTE REQUIRING SPOUSAL NOTIFICATION PRIOR TO A WIFE UNDERGOING ABORTION IS RATIONALLY BASED AND ADVANCES THE STATE'S INTEREST IN PROMOTING THE INTEGRITY OF THE MARRIAGE RELATIONSHIP.	5
A. A substantial body of professional and social opinion supports the testimony of the Respondents' expert witness that involvement of a husband in abortion decisionmaking is beneficial.	5
B. Various sociological studies show that marital integrity is enhanced by communication and weakened by avoidance of discussion of critical and important issues.	9
C. A significant number of husbands are not notified in advance of their wife's abortion who would be included in the scope of the spousal notification provision.	11

D. Husbands may not be notified prior to their wife's abortion in functioning marriage situations. 13

E. Ignoring the husband in the decision-making process may damage or destroy the marriage relationship. 16

II. A REQUIREMENT OF SPOUSAL NOTIFICATION PRIOR TO ABORTION DOES NOT CREATE A SUBSTANTIAL RISK THAT A WOMAN WHO WOULD OTHERWISE HAVE AN ABORTION WOULD BE PREVENTED FROM DOING SO BY PHYSICAL VIOLENCE OR BY ECONOMIC AND PSYCHOLOGICAL DISTRESS. 20

III. A STATE STATUTE REQUIRING SPOUSAL NOTIFICATION PRIOR TO A WIFE UNDERGOING ABORTION IS RATIONALLY BASED AND ADVANCES THE STATE'S INTEREST TO PROTECT A SPOUSE'S INTEREST IN HAVING CHILDREN WITHIN MARRIAGE AND IN PROTECTING THE PRENATAL LIFE OF THAT SPOUSE'S CHILD. 23

A. Notifying a husband prior to an anticipated abortion increases the likelihood of childbirth 23

B. Abortion may destroy or impair the opportunity for future fatherhood. . . . 25

Conclusion 28

TABLE OF AUTHORITIES

Cases	Page
Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991)	20
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18 Pa. Cons. Stat. Sec. 3209	*passim*
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INTEREST OF AMICI CURIAE[1]

Amici Curiae— The Rutherford Institute and its affiliated state chapters have as two of their purposes the strengthening of the traditional family and fostering respect for the uniqueness

[1] Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

and paramount worth of human life. These values are deeply rooted in America's common law constitutional tradition and its morality and values. Diminishing the value of human relationships and respect for life, including prenatal life, diminishes, in one form or another, the lives of all citizens. The Rutherford Institute believes that this case, with issues concerning the power of states to regulate abortion and to sustain and protect the traditional American family, is important to constitutional jurisprudence and the growth and progress of the nation.

Beginning in 1985, Amici Curiae undertook to extensively research the available medical and social literature to determine the extent to which the legalization of abortion had an adverse effect on the quality of life of men and women, the impact on the family and its effect on health and social life. The relevant portions of that research are presented particularly as applied to the importance of spousal notification prior to abortion.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th century Scottish minister and Rector at St. Andrew's University. It has state chapters in 40 states and affiliates on three continents, with offices in four foreign countries and an international office in Charlottesville, Virginia. Counsel for Amici Curiae have specialized in litigation in state and federal courts and have participated as counsel in previous cases before this Court in significant cases relating to the protection of human life and family values. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici Curiae hereby adopt the proposed findings of fact submitted by the Respondent to the trial court below.

SUMMARY OF ARGUMENT

The literature is sparse on the nature and extent of males', including husband's, involvement in abortion decisionmaking, although there appears to be general agreement that the male is important to the decisionmaking process. Studies which discuss whether or not or under what circumstances spouses may or may not be notified prior to abortion are rare. Only one published study could be located which provides specific reasons why wives do not tell their husbands in advance of abortion. Anecdotal reports where husbands do not know beforehand are scattered throughout the literature and are included herein, including press reports. While these anecdotal reports are helpful, generalizations are difficult or impossible. Under these circumstances the stage is set for speculation and conjecture in the general absence of information. With these limitations, Amici Curiae have sought to summarize the body of professional opinion that supports male involvement in abortion decision-making, to ascertain the effects on a marriage if communication on important subjects such as childbearing does not occur, to examine the types of marital relationships where husbands are not notified and to learn something of the qualities of women who seek abortion and who have not told their partner. The following conclusions were made based upon this analysis.

Spousal notification prior to a wife undergoing an abortion where prenatal life has been conceived within the marriage relationship is rationally related to the integrity of the marital relationship and protects the spouse's interest in having children within marriage. A substantial body of professional opinion supports involvement of a husband in abortion decision making. In addition, various sociological studies have demonstrated that marital integrity is enhanced by communication and weakened by avoidance of discussion of critical and important issues. There are a significant number of spouses who would not be

notified prior to abortion unless the spousal notification provision law is implemented.

The lower court erroneously found that there was a substantial risk that spousal notification would bring on physical violence or economic or psychological distress. Based upon the only study in the published literature, only one out of ten women reported fear of verbal or physical abuse as the reason for not telling her husband in advance of abortion. None mentioned economic distress or coercion as a reason for not telling their husbands. Other data also support this finding.

Based upon available reports, lack of intimacy in marriage, marital conflict, isolation or distancing or wives who make hasty or impulsive decisions are examples of situations where husbands may not know in advance of abortion. Not notifying husbands may be very damaging or destructive to the marriage relationship and these include situations where abortion may occur out of spite or because of a power struggle in which prenatal life is used as a weapon, or where the husband had a strong belief in the humanity of prenatal life, or where a husband was ill. Notification of a husband where a wife is considering abortion has been shown to increase the likelihood of a decision for childbirth and also may enhance the opportunity for future fatherhood.

ARGUMENT

I. A STATE STATUTE REQUIRING SPOUSAL NOTIFICATION PRIOR TO A WIFE UNDERGOING ABORTION IS RATIONALLY BASED AND ADVANCES THE STATE'S INTEREST IN PROMOTING THE INTEGRITY OF THE MARRIAGE RELATIONSHIP.

A. A substantial body of professional and social opinion supports the testimony of the Respondents' expert witness that involvement of a husband in abortion decision-making is beneficial.

Marriage and family therapist, Dr. Vincent Rue, an expert witness for the Respondent Commonwealth of Pennsylvania, testified that spousal notification was beneficial stating that "communication is very important in marriage (and it is) the bedrock of healthy marriages. Most marriages are neither so good that spousal notification is unnecessary or so bad that it would be presumed harmful to the wife to notify the husband with respect to the abortion." Joint Appendix of Petitioners and Respondents at 802.

There is considerable support in the professional literature for involvement of the husband in abortion decision making. For example a Committee of the American Public Health Association has recommended: "Informational abortion counseling should, where appropriate, include partner, husband, parents or other significant persons accompanying the patient". Barnes, *Ambulatory Maternal Health Care and Family Planning Services, Policies, Principles, Practices*, Committee on Maternal Health Care and Family Planning, Maternal and Child Health Section, American Public Health Association (1978), p. 49.

In a current medical text book entitled Obstetrical Decision Making, it is stated in an article entitled Unplanned Pregnancy:

> "to ensure the woman understands the significance of her choice between abortion and carrying the fetus to term for adoption or to keep and raise it... it is prudent to involve her partner or a family member in counseling with her permission." Perlmutter and Stewart, *Unplanned Pregnancy*, in *Obstetrical Decision Making*, Second Edition, Ed. Friedman, Acker, Sachs (1987), p.40.

Another article in the same medical text entitled Abortion Counseling states:

> "If possible, involve the father of the fetus in the decision-making." Borten and Stewart, *Abortion Counseling*, in *Obstetrical Decision Making*, Second Edition, Ed. Friedman, Acker, Sachs (1987), p.44.

The necessity for spousal involvement in abortion decision-making recognizes that it is impossible to lift a pregnant woman out of her primary loyalty system i.e. her present and future family network for the purpose of decision-making without manifesting a complimentary therapeutic concern for the relationship fall-out of her decision on her *mate*, parents, children (born and unborn) and other significant relationships. Cotroneo and Krasner, *A Study of Abortion and Problems in Decisionmaking*, 3 J. Marriage and Family Counseling 69 (1977) (emphasis added). Other authorities have made similar findings.[2]

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[2] Walter, *Psychologic and Emotional Consequences of Elective Abortion: A Review*, 36(3) Obstetrics and Gynecology 482 (Sept. 1970) (Any woman seeking abortion should be dealt with in the context of a social unit of inter-relationships and the most prominent is her sexual partner); Lieh-Mak, Tam, Ng, *Husbands of Abortion Applicants: A Comparison With Husbands of Women Who Complete Their Pregnancies*, 14 Social Psychiatry 59 (1979) (The husband plays an important role in abortion-seeking and fertility regulation. It is high time we should give substance to the shadowy figure that we call the male partner); Senay, *Therapeutic Abortion-Clinical Aspects*, 23 Archives General Psychiatry 408 (Nov. 1970)(One should

Not only professionals think the spouse should be involved but also males who were involved in abortion. In a sociological study of 1000 males who accompanied their partners or wives to 30 different abortion clinics in 18 different states during 1981, a majority thought abortion clinics should be required to notify a husband before performing an abortion on his wife. It was believed that such a law might achieve the following desirable results:

1. It could provide a very short "cooling off" period in which both parties might further explore the decision.

2. It could encourage a wife to reconsider her decision if it was made solely in response to a temporary problem in the couple's relationship.

3. It could encourage the husband to reconsider and improve his pledge of emotional and financial support for bringing the fetus to term and rearing their child.

4. It could help a wife stop guessing what her husband's reaction is to her pregnancy before she has a chance to hear his side.

5. It could help a husband gain a better understanding of his wife's final decision and the status of their relationship even if he disagrees with that decision.

Shostak and McLouth, *Men and Abortion, Lessons, Losses and Love* (1984), p. 213.

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always interview the spouse, fiance or parent in order to understand the psychology of the crisis and to involve this person in the preparation for the procedure); Handy, *Psychological and Social Aspects of Induced Abortion*, 21 Br. J. Clinical Psychology 29 (1982) (Actively including men in the abortion decision may facilitate future joint family planning while rebuffing involvement might result in increased passivity and detachment from family responsibilities).

Respondent's expert witness, Dr. Vincent Rue also testified at the trial that it is advantageous for wives to draw upon the support of their husbands in a crisis pregnancy decision-making period. One reason he stated was that a conflicted relationship at the time of abortion is a psychological risk for the woman experiencing a painful aftermath from abortion. J.A. 802-803. This is well documented in the literature[3] and is an important point that is over-looked by those opposed to spousal notification. Others are also in agreement with Rue.[4]

In summary, the professional sources conclude that involvement of husbands in abortion decision-making is needed to convey information about the abortion procedure, to help in the decision between abortion or childbirth, to understand the social context of the woman, to acknowledge the important role the husband plays in abortion-seeking and fertility regulation, to understand the psychology of the crisis pregnancy and to involve the husband in preparation for the abortion procedure. The approach taken by male partners was somewhat different. It tended to emphasize the importance of communication between husband and wife for clarification, the minimizing of conflict and the reconsideration of previously stated positions.

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[3] This includes anger and depression, Payne, Kravitz, Notman, Anderson, *Outcome Following Therapeutic Abortion*, 33 Archives General Psychiatry 725 (June 1976), or regretting the decision to abort, Freeman, *Abortion: Subjective Attitudes and Feelings*, 10(3) Family Planning Perspectives 150 (May/June 1978), or loneliness or isolation, Robbins and DeLamater, *Support from Significant Others and Loneliness Following Induced Abortion*, 20 Social Psychiatry 92 (1985), or increased psychiatric hospital admission rates, David, Rasmussen, Holt, *Postpartum and Post Abortion Psychotic Reactions*, 13(2) Family Planning Perspectives 88 (March 1981), or risk for post traumatic stress disorder, Barnard, *The Long Term Psychological Effects of Abortion*, Institute for Abortion Recovery and Research: Portsmouth, NH (1990).

[4] Robbins and DeLamater, *supra*, n. 3 at 98; Sherman, et al., *infra*, n.5 at 106.

A requirement that husbands be notified prior to abortion is a step in the direction of advancement of each of these goals.

B. Various sociological studies show that marital integrity is enhanced by communication and weakened by avoidance of discussion of critical and important issues.

The U.S. Supreme Court has recognized that a decision as to whether or not to terminate a pregnancy is "an important and vital issue" in a marriage. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 71 (1975). Clearly it should be so considered.[5]

Communication in important matters of marriage and family life will enhance marital integrity. For example, researchers from the University of Minnesota assessed what major marital factors were present in highly satisfied families where the husband and wife were living together. It was found that communication and conflict resolution were important factors. Low stress families, both with and without children, were found to exhibit critical resources of family accord and ability to communicate. Olson, McCubbin, Hamilton and Associates, *Families: What Makes Them Work* (1983).

Similarly, in an Oklahoma State University study of strong families, good communication patterns and an ability to deal with crisis in a positive manner were among the six major characteristics in a wide range of different cultural contexts. Stinnett, *Strong Families: A Portrait in Prevention in Family Services: Approaches to Family Wellness*, Ed. David R. Mace (1983), p. 30-35. In research conducted by the Timberlawn

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[5] In a New York study of women who aborted in which 75% of the women were married or in long term relationships, 62% said the abortion represented a major decision and 46% said the abortion represented a major crisis. Sherman, Mandelman, Kerenyi, Scher, *The Abortion Experience in Private Practice*, in *Women and Loss*. Psychobiological Perspectives, Ed. William F. Finn, et al., The Foundation of Thanatology Series, Vol. 3 (1985), p. 101.

Foundation of Dallas, Texas measured family health and family pathology. It was determined that healthy families exhibited open and direct communication as opposed to distancing, obscuring or confusing communication. Lewis, Beavers, Gossett, Phillips, *No Single Thread: Psychological Health in Family Systems* (1975), pp. 100-104.

Other research has shown that families need to emphasize unity and solidarity and the existence of a meaningful "we." Kantor and Lehr, *Inside the Family: Toward a Theory of Family Process* (1975, 1976).

However, if there is lack of family communication the real possibility of destructive conflict arises. A recent study by researchers at the University of Wisconsin and the University of Michigan on 373 married couples in the Detroit area reported that one of the most consistent predictors of marital unhappiness is destructive conflict. The researchers learned that one of the biggest dangers was attempting to try to avoid conflict at all. Avoidance merely means couples never get to the issues which blow up later according to the authors of the study. What is needed is constructive fighting which means "calmly discussing issues, really listening, saying nice things and making your spouse laugh to defuse the anger." *Fighting Fair Keeps Marriages Strong*, U.S.A. Today, Feb. 20, 1992, p. 6DT.

Abortion of prenatal life conceived within marriage by the wife without prior notification to the husband undermines marital integrity. It lacks the essential element of open and direct communication and does not resolve any underlying issues that gave rise to any conflict. It takes the "we" out of marriage and seeks instead to substitute a deadly autonomy. It is a prime example of destructive conflict.

C. A significant number of husbands are not notified in advance of their wife's abortion who would be included in the scope of the spousal notification provision.

Various studies based upon reports of primarily single women have indicated that from 10-33% of their male partners in conception did not know of the abortion beforehand.[6] Husbands are more likely to be advised than non-married men. Based upon limited studies, 6-7% of husbands do not know of their wives abortion in advance.[7] If women are repeating abortion, there is evidence that a considerably greater number of male partners do not know about the abortion in advance. A Canadian study of mostly single women found that 45% of the male partners did not know in advance if the women were repeating abortion compared to 33% if the women were undergoing abortion for the first time.[8] A Hungarian study of married

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[6] Shusterman, *Predicting the Psychological Consequences of Abortion*, 13A Social Science and Medicine 683 (1979) (19%); Robbins and DeLamater, *Support from Significant Others and Loneliness Following Induced Abortion*, 20 Social Psychiatry 92 (1985) (25%); Plutzer and Ryan, *Notifying Husbands About an Abortion*, 71(3) Sociology and Social Research 183 (April, 1987) (10.5%), Freeman, *Abortion: Subjective Attitudes and Feelings*, 10(3) Family Planning Perspectives 150 (May/June 1978) (23%); Berger, Gold, Andress, *Repeat Abortion: Is It a Problem?*, 16(2) Family Planning Perspectives 70 (March/April 1984) (33% for first time abortion and 45% for women repeating abortion).

[7] These limited studies cannot necessarily be generalized to other populations. For example, according to press reports quoting the counseling director of the Women's Medical Center in Washington, D.C. most of the married women who had abortions at their center did so without the knowledge of their husbands. Paterson, *Whose Freedom of Choice?*, The Progressive 42 (April 1982), p. 44.

[8] Berger, *supra* n.6.

couples found that when women were repeating abortion, 33% of the decisions for abortion were made alone.[9]

In one study at Kings College in London published in 1977, 6% of the married women studied reported their husbands did not know of the abortion in advance. Belsey, Greer, Lal, Lewis, Beard, *Predictive Factors in Emotional Response to Abortion: King's Termination Study-IV*, 11 Social Science & Medicine 71 (1977). A study of married women repeating abortion at a Columbus, Ohio abortion clinic in 1973-74 reported the attitude of the husband toward the abortion in all but 5.8% of the cases. Aguirre, *Repeat Induced Abortion: Single, Married and Divorced Women*, 12 J. Biosocial Science 275 (1980).

An Illinois study in 1984 based on a questionnaire submitted to women at an abortion clinic found that 7% of the married women did not tell their husbands of their pregnancy or abortion. This 7% which totaled 20 women, gave the following reasons for not notifying their husbands:

extra-marital affair	-7
rape by another	-1
rape by husband	-1
broken up/living apart	-2
marital problems	-4
feared verbal and physical abuse	-1
husband very disapproving of abortion	-2
possible skewed relationship	-1
protecting him from crisis	-1
TOTAL	**20**

Based upon this Illinois study, 10 of the situations or about 3.5% of the married men would be notified under the provisions of the spousal notification law: An extra-marital affair(7), rape by another(l), rape by husband(1) and fear of verbal and physical

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[9] Szabady and Klinger, *Pilot Surveys of Repeated Abortion Seeking*, 14 International Mental Health Research Newsletter 6 (1972).

abuse(1) would be excluded from the spousal notification requirement. 18 Pa. Cons. Stat., Sec. 3209; Plutzer and Ryan, *Notifying Husbands About an Abortion*, 71(3) Sociology and Social Research 183 (April, 1987). The study did not indicate whether or not any of the married women were repeating abortion. If that were the case it is likely that the number of husbands not knowing about an abortion in advance would be significantly higher.[10]

D. Husbands may not be notified prior to their wife's abortion in functioning marriage situations.

The Illinois study on why women do not notify their husbands prior to abortion reflected evidence of poor communication as well as significant conflict in the marriage. However, a marriage need not necessarily be falling apart or on the verge of divorce in order for married couples to fail to communicate. For example, a lack of intimacy in a relationship is an important reason why a husband or partner may not be told about a pregnancy or abortion. Shusterman, *Predicting the Psychological Consequences of Abortion*, 13A Social Science and Medicine 683 (1979). Lack of intimacy may arise if the woman considers herself "liberated" as this will tend to diminish the significance of her partner in conception, at least in her eyes. Moseley, Follingstad, Harley, Heckel, *Psychological Factors That Predict Reaction to Abortion*, 37 J. of Clinical Psychology, 276 (1981). A highly dominant, independent wife who is not in touch with her emotions and who has an incapacitated husband may not tell him about an abortion. Mumford, *An Interdisciplinary Study of Four Wives Who Had Induced Abortions*, 87 Am. J. Obstet. and Gynecol. 865 (1963).

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[10] The repeat abortion rate in the U.S. in 1986 was nearly 50% and increases 1-2% each year. Kochanek, *Induced Terminations of Pregnancy: Reporting States*, 37(12) Monthly Vital Statistics Report 19 (April 28, 1989). (Among approximately 300,000 women, 48.6% reported a repeat abortion).

Marital conflict is another reason why wives may not tell their husbands prior to abortion. In one case involving a marriage of eight years duration and with two children, the wife became pregnant during a time of marital conflict. It appeared that the husband wanted another child in an attempt to hold the marriage together while the wife was considering divorce. The wife had an abortion without telling the husband in advance. Following the abortion the couple did not separate or divorce but the underlying conflicts remained unresolved. No threats of physical, economic or psychological abuse by the husbands were reported. To the contrary the husband evidenced concern over the well-being of his wife. Blumenfield, *Psychological Factors Involved in Request for Elective Abortion*, The Journal of Clinical Psychology 17 (Jan. 1978).

If the woman (married or unmarried) is repeating abortion she is less likely to tell others she is doing so-including a husband or partner. In a study at Yale University School of Medicine women having first abortions told an average of 3.0 people compared to only 2.4 if they were repeating abortion. Bracken and Kasl, *First and Repeat Abortions: A Study of Decision Making and Delay*, 7 J. Biosocial Science 473 (1975). A Hungarian study found that as abortion was repeated in marriage, wives were more and more likely to report that they did not feel close to their husbands during subsequent pregnancies. As the number of induced abortions increased, the abortion decision was more often made by the wife alone. Overall, among wives repeating abortion approximately 33% made the decision alone. Although the wives reported that they were increasingly unhappy with their marriages as the number of abortions increased, the overall divorce rate remained very low (1.3%). In these marriages the decision to abort without consulting the husband did not correlate with the incidence of divorce. This study is probably the best evidence that marriages may remain functional i.e. the parties did not separate or divorce, even though a substantial number of wives decided for abortion without con-

sulting their husbands. Szabady and Klinger, *Pilot Surveys of Repeated Abortion Seeking*, 14 International Mental Health Research Newsletter 6 (1972).

There is considerable evidence that those repeating abortion particularly need to consult with someone else. For example, A New York study found that repeat abortion patients were characterized as having impulsive behavior patterns, an absence of reflectedness, an inability to foresee consequences and a reduced ability to plan ahead in directed tasks. Rovinsky, *Abortion Recidivism, A Problem in Preventive Medicine*, 39(5) J. Obstetrics and Gynecology 649 (May, 1972). Other studies have made similar findings.

Another type of woman who may not tell her husband or partner about a decision to abort is the woman who makes a hasty, impulsive decision. In a 1971-72 study by researchers at the Yale University School of Medicine, 100 women who had abortions were compared with 100 women who had initially applied for abortion and later changed their minds and carried to term. It was found that those who decided not to abort were more likely to have partners who gave negative responses to abortion. Some of these women appeared to have initially sought abortion before considering important information from relevant sources-including their partners. Swigar, Quinlan, Wexler, *Abortion Applicants: Characteristics Distinguishing Dropouts Remaining Pregnant and Those Having Abortions*, 67(1) Am. J. Public Health 142 (Feb. 1977); Swigar, Breslin, Pouzzner, Quinlan, Blum, *Interview Follow-Up of Abortion Applicant Dropouts*, 11 Social Psychiatry 135 (1976).

The Swigar studies probably provide the clearest example of how the alteration of circumstances or the consideration of additional factors, can change the initial decision for abortion into a decision for childbirth. Women who ultimately did so took moral or religious beliefs into account, found out that their partner desired the baby, learned that the partner or significant

other would provide help, an initial marital separation had been reconciled and was back with her husband, abortion was equated with the loss of the partner or there had been a favorable change in money or housing. *See also* Friedlander, Kaul, Stimel, *Abortion: Predicting the Complexity of the Decision-Making Process*, 9(1) Women & Health 43 (Spring, 1984) (Partner involvement increased the complexity of the abortion decision with the more involved the relationship the greater its influence appeared to be in continuing the pregnancy). These studies tend to confirm what others have also learned i.e. the more the woman is provided social support the more likely she is to carry her pregnancy to term. Isolated, distant, impulsive women without social support frequently decide for abortion.[11]

E. Ignoring the husband in the decisionmaking process may damage or destroy the marriage relationship.

There is evidence that not telling a husband in advance of abortion is the most likely possibility to cause a deterioration in marital relations. A study of 131 married women at Kings College Hospital in London compared the husband's attitude toward abortion with marital adjustment three months following induced abortion. 6% of the married women reported their husbands did not know of the abortion beforehand. In cases

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[11] Other studies have made similar findings. Bracken, Klerman and Bracken, *Abortion, Adoption or Motherhood. An Empirical Study of Decision-Making During Pregnancy*, 130 Am. J. Obstetrics and Gynecology 25 (1978) (The outcome of pregnancy was related to circumstances surrounding each particular pregnancy); Murphy, Symington, Jacobson, *Pregnancy Resolution Decisions. What If Abortions Were Banned?*, 28(11) The J. of Reproductive Medicine 789 (Nov. 1983) (The availability of another person to help made it more likely the pregnancy would be carried to term); Reardon, *Aborted Women: Silent No More* (1987), p. 11 (83% of women in a study of members of Women Exploited By Abortion said the abortion outcome would have been different if male partners or others had encouraged differently).

where he did not know prior to the abortion, 62% of the wives reported mediocre or unsatisfactory marital adjustment. If husbands had urged the abortion upon an initially resistant wife it was 30%. If the husband had wanted the pregnancy to be carried to term and the wife did not it was 17%. If the husband approved of the abortion with the wife apparently also wanting the abortion it was only 7%. Belsey, Greer, Lal, Lewis, Beard, *Predictive Factors in Emotional Response to Abortion: King's Termination Study-IV*, 11 Social Science & Medicine 71 (1977).

It also appears from various scattered reports that at least some husbands will become greatly angered and distressed if their wife obtains an abortion without their knowledge. This may result in serious deterioration of the relationship or possibly divorce. It may also trigger illness in the husband. For example, during a family counseling session a husband learned from one of his children that his wife had terminated a pregnancy without his knowledge. He was very angry and suffered what appeared to be psychosomatic problems and was hospitalized for hypertension which had not responded to treatment. His reaction to the death was heightened because he also had an unresolved anger toward his mother who had died some years before. He had not been told about the pregnancy or abortion because he was ill. McAll and Wilson, *Ritual Mourning for Unresolved Grief After Abortion*, 80(7) Southern Medical Journal 818 (1987).

In *Przbyla v. Przbyla*, 275 N.W.2d 112 (Wis. App. 1978), a husband brought a claim against his wife for intentional infliction of emotional distress after she had allegedly falsely misrepresented and deceived him about her intentions to seek an abortion. In another case a husband, identified as " Vince", and who believed abortion was murder, found out that his wife had obtained an abortion without his knowledge or consent. Shortly thereafter, Vince obtained a divorce from his wife claiming the abortion had killed his love for her. Shostak and

McLouth, *Men and Abortion, Lessons, Losses and Love* (1984), p. 217.

In New York, orthodontist David Ostreicher sought legal redress against his wife and the abortion facility for "cruel and inhuman treatment" after his wife obtained an abortion without his knowledge. According to Dr. Ostreicher both he and his wife wanted and planned for a baby. However, once she became pregnant she began pressing him to tear up a pre-nuptial agreement and saying that if he refused, she would have an abortion. Until she had the abortion he thought it was an empty threat. "A wife shouldn't be able to use the fetus as a hostage," he says. "There should be laws against it." Papier, *Distressed Fathers Assert Rights in Abortion Cases Across Nation*, The Washington Times, June 7, 1988, p. 1A.

In another reported incident a man in St. Clair Shores Michigan publicly protested that his wife had murdered their baby. "She killed our child without giving me any notice," said the man, a lawyer who asked that his name be withheld." I look at abortion as homicide, but it may be justifiable homicide under very rare cases-a rape pregnancy, for example. I just think that everyone should be held accountable for bringing on life men and women. Life is precious; too precious to be thrown away like that." Gaydos, *Men and Abortion*, Gannett News Service, Tucson Citizen, June 14, 1988, p. 1NW.

And in another case, Gary Bell, later the founder of DADS for Life, reported that he came home from work one day to find his wife in tears after just having had an abortion. He had not even known she was pregnant. He suffered severe pain and agony which was intensified when his wife became pregnant once again and despite his protests had a second abortion. Finally a son was born of the marriage after very narrowly avoiding yet another abortion. But Gary became very over-protective of his son and due to this behavior eventually lost custody of him in divorce proceedings instituted by his wife.

Vought, *Post Abortion Trauma* (1991), p.26-27. These incidents do not appear to be isolated instances. Joseph Scheidler, who heads a Chicago based pro-life organization says, I have had dozens of phone calls.... from men who have found out by one means or another that their child's mother has already had an abortion. All were at least somewhat angry, very confused and bewildered. Most wanted to know what legal action they could take. One man had found an abortion receipt on his wife's dresser; one found the bill on his charge card. Some have said they could no longer live with the woman who destroyed their child without even consulting the child's father. One such desperate man said he had already filed for divorce. He could not live with a woman who would kill his child." Shostak and McLouth, *Men and Abortion, Lessons, Losses and Love* (1984) p. 169, *quoting* Joseph Scheidler.

These incidents support the concept that not notifying at least some husbands prior to abortion is very destructive to the marriage relationship. In these cases abortions were done for reasons the men perceive to be out of spite or because of a power struggle in which prenatal life is used as a weapon, or because the husbands had a strong belief in the humanity of prenatal life, or because the husband was ill and in a vulnerable state.

From the available reports it appears that husbands who are not notified are likely to care deeply about the value of childbirth and to be greatly upset upon learning of abortion after the fact. They may suffer illness or alienation or exhibit a sense of great anguish. Many of them were in functioning marriages that deteriorated following the abortion-some which resulted in divorce or other legal proceedings. At least in one case (David Ostreicher) it was unclear as to whether or not he could have been deemed to have knowledge of his wife's abortion in advance.[12] In this instance a spousal notification requirement

[12] In the London study some women who had not specifically notified their husbands also expressed uncertainty as to whether their husbands actually knew of the abortion or not. Belsey, et al., *supra*, p. 9 at 75.

could have prevented a lawsuit against the abortion facility or provided a defense if one was instituted. Thus, there are possible potential benefits to the Petitioners if this legislation is upheld.

The case of Gary Bell illustrates that it is possible to convince a wife not to obtain an abortion of a subsequent pregnancy if he had prior notice although it would not be a certainty. The first abortion by his wife without notice made it much more likely that she would have a repeat abortion, which, in fact, occurred. Each succeeding abortion makes it more likely that the couple will distance themselves from one another and thus places their marriage increasingly at risk.[13] Ultimately the marriage did result in divorce. The abortion experience appeared to adversely affect his parenting skills once a child was born of the marriage resulting in overprotectiveness.

II. A REQUIREMENT OF SPOUSAL NOTIFICATION PRIOR TO ABORTION DOES NOT CREATE A SUBSTANTIAL RISK THAT A WOMAN WHO WOULD OTHERWISE HAVE AN ABORTION WOULD BE PREVENTED FROM DOING SO BY PHYSICAL VIOLENCE OR BY ECONOMIC AND PSYCHOLOGICAL DISTRESS.

The lower court erroneously found that spousal notification created a substantial risk that a woman who would otherwise have an abortion would be prevented from doing so by physical violence, or by economic and psychological distress. *Planned Parenthood v. Casey*, 947 F.2d 682, 713 (3d Cir. 1991).

In the 1984 Illinois survey of 20 married women who did not tell their husbands about their pregnancy and abortion, only 10 would fall under the provisions of the act once the exceptions

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[13] Bracken and Kasl, *First and Repeat Abortions: A Study of Decision Making and Delay*, 7 J. Biosocial Science 473 (1975). (Women repeating abortion are in less stable social relationships than women who seek abortion for the first time.)

were taken into account. Of the 10 remaining women only 1 or 10% stated a fear of verbal and physical abuse from the husband as the basis for not telling him. The other reasons in the Illinois study indicate marital problems or possible disagreement but do not indicate any particular threat of economic or psychological distress visited upon the wife by the husband. Plutzer and Ryan, *Notifying Husbands About an Abortion*, 71(3) Sociology and Social Research 183 (April, 1987). This is the only study on the subject in the social literature.[14]

The findings of this Illinois study are supported by research at the Yale University School of Medicine on 27 women who initially sought abortion but later changed their minds and carried to term. None of the women interviewed reported threats to physical safety or psychological or economic threats or abuse when they were asked what made them change their minds. Swigar, Breslin, Pouzzner, Quinlan, Blum, *Interview Follow-Up of Abortion Applicant Dropouts*, 11 Social Psychiatry 135 (1976).

Also, the eight anecdotal reports that could be located in the literature where husbands were not advised of their wife's abortion in advance do not appear to be likely possibilities for spousal abuse or child abuse. In one case the husband was reported to be concerned about the well-being of his wife.[15] In another, the wife was very domineering while the husband was incapacitated.[16] In 3 cases the husbands sought legal redress by

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[14] See also follow-up study of same sample, Ryan and Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Integration*, 51 J. Marriage and the Family 41 (Feb. 1989).

[15] Blumenfield, *Psychological Factors Involved in Request For Elective Abortion*, The J. of Clinical Psychology 17 (Jan. 1978).

[16] Mumford, *An Interdisciplinary Study of Four Wives Who Had Induced Abortions*, 87 Am. J. Obstet. and Gynecol. 865 (1963).

bringing a lawsuit against their wives.[17] In one case the husband publicly protested.[18] In two cases the husbands appeared to direct their anger and grief inwardly as they became ill as a result of the abortion.[19] In one case the husband was hospitalized for hypertension. This family was in therapy and was helped to recover from the effects of the abortion by grief therapy. In the other the husband developed two stress conditions related to the abortion. He was also very protective of the one child born of the marriage. In four cases divorce proceedings were initiated with at least two marriages ending in divorce.

Finally, it appears from the available reports in the literature that men who are already physically abusing their wives are ones most likely to urge abortion or reject the unborn child not urge childbirth. In a study of sixty battered women referred by the medical staff of a rural health clinic, the women reported changes in the pattern of family violence during pregnancy. There was increasing abuse for some with the pregnant abdomen replacing face and breasts as the target for battering with abortions and premature births as the result. Others reported less abuse with pregnancy and one woman deliberately stayed pregnant to avoid violence. Hilberman and Munson, *Sixty Battered Women*, 2 Victimology 460 (1977-78). In another report a husband beat the wife extensively over the course of a 13 year marriage. He beat her during pregnancies, punching her in the face and stomach and kicking her between the legs. Following the birth of their first two children, he had forced her to have

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[17] Shostak and McLouth, *Men and Abortion, Lessons, Losses and Love* (1984), p. 217; Papier, *Distressed Fathers Assert Rights in Abortion Cases Across Nation*. The Washington Times, June 7, 1988, p. 1A; *Przbyla v. Przbyla*, 275 N.W.2d 112 (Wis. App. 1978).

[18] Gaydos, *Men and Abortion*, Gannett News Service, Tucson Citizen, June 14, 1988, p. 1NW.

[19] McAll and Wilson, *Ritual Mourning for Unresolved Grief After Abortion*, 80(7) So. Medical Journal 818 (1987); Vought, *Post Abortion Trauma* (1991), p. 26-27.

two abortions she did not want. The wife became pregnant a third time when the husband forced her to have sex with him which resulted in the birth of their third child, again after the wife refused to have an abortion. The case was referred to by social workers as "not atypical." Tolman, *Protecting the Children of Battered Women*, 3(4) J. of Interpersonal Violence 476 (Dec. 1988).

What appears from the Illinois study is that most women will at least notify their husband prior to abortion. However, there is a significant group of women who simply wish to avoid discussing the issue of pregnancy and abortion or childbirth at all with their spouse although he would be the father. Few of these have expressed a threat to their physical or psychological safety.

III. A STATE STATUTE REQUIRING SPOUSAL NOTIFICATION PRIOR TO A WIFE UNDERGOING ABORTION IS RATIONALLY BASED AND ADVANCES THE STATE'S INTEREST TO PROTECT A SPOUSE'S INTEREST IN HAVING CHILDREN WITHIN MARRIAGE AND IN PROTECTING THE PRENATAL LIFE OF THAT SPOUSE'S CHILD.

A. Notifying a husband prior to an anticipated abortion increases the likelihood of childbirth.

In the 1984 Illinois survey in which 20 married women were identified who did not notify their husband about their pregnancy and abortion, 2 of the women said they did not do so because their husband was very disapproving of abortion. Ten of the 20 women would fall under exceptions to the spousal notification statute in question (spouse is not the father of the child(8), rape by husband(1), fear of physical abuse(1). Based on this survey 2/10 or 20% of the applicable situations would

involve husbands who were very disapproving of abortion. Plutzer and Ryan, *Notifying Husbands About an Abortion*, 71(3) Sociology and Social Research 183 (April, 1987).

A study by researchers at the Yale University School of Medicine in 1971-72 compared 100 women who had abortions with 100 women who had initially applied for abortions but later changed their minds and carried to term. They also concluded from their study that women were less likely to tell the partner if they thought he would strongly object to the abortion. Swigar, Breslin, Pouzzner, Quinlan, Blum, *Interview Follow-Up of Abortion Applicant Dropouts*, 11 Social Psychiatry 135 (1976), *citing* Swigar, et al., *Abortion Applicants: Characteristics Distinguishing Dropouts Remaining Pregnant and Those Having Abortions*, 67(1) Am. J. Public Health 142 (Feb. 1977). The Yale University School of Medicine studies also made another important finding i.e. those who initially applied for abortion and later changed their minds and carried their child to term did so, in part, because they were more likely to have partners who gave negative responses to abortion. Thus, the partner opposition to abortion was a factor in the decision for childbirth over abortion. Swigar, Quinlan, Wexler, *Abortion Applicants: Characteristics Distinguishing Dropouts Remaining Pregnant and Those Having Abortions*, 67(1) Am.J. Public Health 142 (Feb. 1977).

In a specific case illustration where a husband's objection made a difference, Mrs. G. had scheduled an abortion because she felt it was her only alternative. Her husband, a Catholic, initially stated he supported whatever decision she made. However, prior to the abortion there was considerable discussion in the media and in newspapers on the abortion issue and Mr. G. began to press his wife to continue the pregnancy. Ultimately, she went along with his wishes partly because he had not previously stated his true feelings earlier and also because she had not wanted a baby that "no one wanted, or just me wanted."

Swigar, Breslin, Pouzzner, Quinlan, Blum, *Interview Follow-Up of Abortion Applicant Dropouts*, 11 Social Psychiatry 135 (1976).

The attitude of the husband toward the pregnancy is important. The adjustment and acceptance of a pregnancy by the wife is adversely affected if the husband says he doesn't want the baby, or if the wife has no one to help her, if she is being deserted by the husband, or has frequent quarrels with him. Helper, Cohen, Beitenmen, Eaton, *Life Events and Acceptance of Pregnancy*, 12 J. Psychosomatic Research 183 (1968). On the other hand, compatibility with the husband has been found to be one of the predictors of positive attitudes toward pregnancy. Some women view a baby as a gift to the husband or as an extension of him rather than the self. Discussions with the husband about the child's future and choosing a name were found to be particularly important in establishing the identity of the baby in the pregnant woman. Leifer, *Psychological Changes Accompanying Pregnancy and Motherhood*, 95 Genetic Psychology Monographs 55 (1977), also citing several studies.

Thus, a requirement of spousal notification prior to abortion where the husband is opposed to abortion appears to be a significant factor to reduce the incidence of abortion and result in more decisions for childbirth.[20]

B. Abortion may destroy or impair the opportunity for future fatherhood.

If prenatal life is aborted there may be considerable distress as a result of the lost opportunity for fatherhood and includes

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[20] Even some feminists have seen a need to expand the role of men in abortion decision-making by pointing out that in every other area of reproduction and child care an active, equal role of men is advocated and that faced with difficult and agonizing choices women should not have to make them alone. McDonnell, *Not An Easy Choice, A Feminist Re-Examines Abortion* (1984), p. 61, 67.

impotence, depression, inability to function, low self-esteem, grief and guilt.

Sociologist Arthur Shostak in his study of male reaction to abortion found that a sizeable minority of males reported the persistence of dreams about the "child-that-never-was" with some representing these moments as times of guilt, remorse and sadness. Shostak, *Abortion as Fatherhood Lost: Problems and Reforms*, 28 The Family Coordinator 569 (Oct. 1979).

Linda Bird Francke in her research on the effects of abortion on men concluded that "for the ones who care, the effects can be devastating." She cites repressed emotions in men following abortion which may reveal itself in various ways. For example, one man feared that a living son would be sacrificed for the aborted one; another felt sadness when he heard a certain song that was connected to the abortion. Another man experienced periodic impotence and depression. He said, "When the eight year old son of a close friend was killed in a car accident, I went to pieces. It took a while to realize that my despair was the grief over the loss of my child, whom I had never had a chance to grieve for and bury. I'm still not sure I have buried that fetus." Francke, *Abortion and Men*, Esquire 59 (Sept. 1978). *See also* Francke, *The Ambivalence of Abortion* (1978).

Researchers at the Tavistock Clinic in London have studied the effects of abortion on males in families. In one instance a man whose job had been rendered obsolete and who had experienced a loss of status and position became increasingly withdrawn and unable to function. He and his wife had previously aborted a child after genetic counseling but they had never grieved the loss nor faced their suppressed anger. Once this was accomplished he was able to resume his search for employment. In another instance, a husband with low self-esteem who came from a working class family married a woman from a wealthy family. During their courtship a child was

conceived and aborted. The wife had very little reaction to the abortion. However, for many years the husband interpreted her insistence on abortion as evidence of him being unworthy to father her first child. Inability to conceive following abortion was also identified in another instance. A wife had undergone a second trimester abortion and for ten years afterward the couple was unable to conceive although there was no physical cause to explain it. The wife blamed the husband for making her do it and the husband described how for ten years he had carried the guilt and horror of what the abortion had done to their marriage. After therapy the wife conceived and delivered a healthy baby. However, additional therapy was necessary when the wife turned against the child and had a severe breakdown. Mattinson, *The Effects of Abortion on a Marriage*, in *Abortion: Medical Progress and Social Implications*, Ciba Foundation Symposium 115 (1985), p. 165-177.

The loss of the opportunity for fatherhood is not necessarily limited to the immediate abortion but may impair or prevent future childbearing or relationships with one's child.

CONCLUSION

Until the male spouse at least has a legal right to notice prior to abortion his experience with abortion will continue to be an exercise of impotency regardless of his religious beliefs, personal convictions, feelings or desire for paternal responsibility. This is particularly true for those who have not at least been notified by their wives in advance.

Married couples engaging in sexual activity out of which prenatal life may develop, are engaging in an activity that is both morally and legally recognized. Harris, *Fathers and Fetuses*, 96 Ethics 594 (April, 1986). A statute requiring notice to a husband prior to abortion merely recognizes that a husband has an interest in having a child perhaps an only child and which may be unmatched by any other interest in his life. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1975) (White, J., concurring in part, dissenting in part).

For all of the compelling reasons set forth above, the judgment of the Court of Appeals that the spousal notification statute was unconstitutional must be reversed.

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